

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

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IN THE MATTER OF THE BOARD	:	ORDER
ORDER TO SHOW CAUSE RE:	:	
POTENTIAL PATTERN OF	:	DOCKET NO. 92-041
VIOLATIONS, INCLUDING	:	CAUSE NO. ACT/015/025
NOTICES OF VIOLATION	:	
N91-35-1-1 AND N91-26-7-2(#2),	:	
CO-OP MINING COMPANY, BEAR	:	
CANYON MINE, ACT/015/025,	:	
EMERY COUNTY, UTAH	:	

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This cause came before the Board of Oil, Gas and Mining, Department of Natural Resources (the "Board"), on January 8, 1993, in the Boardroom of the Division of Oil, Gas and Mining, 3 Triad Center, Suite 520, 355 West North Temple, Salt Lake City, Utah. The hearing was held before Board members, James W. Carter, Chairman, and Dave D. Lauriski. Board members James W. Carter, Dave D. Lauriski, Jay L. Christensen, Raymond Murray, and Judy Lever took place in the deliberation.

Co-Op Mining Company ("Co-Op") was represented by Carl Kingston.

The Division was represented by Thomas A. Mitchell, Assistant Attorney General for the State of Utah.

The Board was represented by William R. Richards, Assistant Attorney General for the State of Utah.

Castle Valley Special Service District, Intervenor, was represented by Jeffrey W. Appel.

NOW THEREFORE, the Board having considered the testimony, pleadings, and exhibits of the parties, and being fully advised in the premises, makes and enters the following:

BACKGROUND

This matter came before the Board on an Order to Show Cause as to why Co-Op's coal mining permit should not be suspended or revoked. The Order to Show Cause was issued because the Director determined that two Notices of Violation¹ (the "NOV's") issued to Co-Op during a twelve-month period could constitute a pattern of violation pursuant to Utah Code Ann. § 40-10-22(1)(d) and Utah Admin. R. 645-400-332.

Co-Op's appeal of the Director's preliminary decision came before the Board on an Order to Show Cause on October 28, 1992. At the hearing, Co-Op attempted to demonstrate that the conduct that led to the issuance of the NOV's was neither willful nor unwarranted, and therefore, the two violations did not constitute a pattern. The Division's counsel objected to the introduction of the evidence on the grounds that the issue of fault had already been determined when the Board's assessment officer issued proposed penalty assessments with the findings that Co-Op had acted recklessly, knowingly, and intentionally in causing the

¹ The two relevant NOV's are NOV N91-35-1-1 and NOV N91-26-7-2(#2). NOV N91-35-1-1 was issued on February 27, 1992. NOV N91-26-7-2(#2) was issued on July 2, 1991. Originally, the Division determined that NOV N91-20-1-1, issued on April 26, 1991, also constituted a pattern. The Division's Director, however, determined during the informal appeal process that NOV N91-20-1-1 did not constitute a pattern because (1) the NOV did not arise from a state inspection and (2) the conduct leading to the issuance of the NOV was not willful or unwarranted.

NOV's. Since Co-Op never appealed the proposed assessments, the Division's counsel maintained that those findings were final and res judicata on the issue of fault.

The Board set a special hearing to determine whether Co-Op could introduce evidence re-examining the finalized assessments. The parties have filed briefs and have made oral argument concerning the res judicata effect of the Board's previous final penalty assessments. This Order resolves that issue. For the reasons set forth below, we find that the penalty assessments are final orders of the Board and that Co-Op is collaterally estopped from attacking the findings underlying those orders.

Before we discuss our legal conclusions, it will be helpful to first discuss the Notice of Violation and Pattern of Violation process.

THE NOV PROCESS

The Division is directed to issue a Notice of Violation if "it finds a violation of the State Program or any condition of a permit." Utah Admin. R. 645-400-320. Once the Division issues a Notice of Violation, the Board appoints an assessment officer to determine whether a civil penalty will be assessed, and the amount of the penalty. Utah Admin. R. 645-401-100. To determine the amount of the penalty, the assessment officer reviews the history of previous violations, the seriousness of each violation, the operator's degree of fault, and the operator's good faith in attempting to abate the violation. Utah Admin. R. 645-401-300.

To assess penalty points for the operator's fault in causing the violation, the assessment officer measures the operator's conduct against a statutory sliding scale. Utah Admin. R. 645-401-313.² If the assessment officer determines that the violation occurred through "no fault of the operator, or by inadvertence which was unavoidable by the exercise of reasonable care," the assessment officer is obligated to "assign no penalty points for degree of fault." Utah Admin. R. 645-401-323.110. If the violation occurred due to the operator's "indifference, lack of diligence, or lack of reasonable care," the assessment officer may assign up to 15 penalty points. Utah Admin. R. 645-401-323.120. Finally, if the assessment officer determines that the operator acted through a "greater degree of fault," defined as

² Utah Admin. R. 645-401-323.100. Points are to be assigned as follows:

- 323.110 A violation which occurs through no fault of the operator, or by inadvertence which was unavoidable by the exercise of reasonable care, will be assigned no penalty points for degree of fault;
- 323.120 A violation which is caused by fault of the operator will be assigned 15 points or less, depending on the degree of fault; fault means the failure of a permittee to prevent the occurrence of any violation of his or her permit or any requirement of the State Program due to indifference, lack of diligence, or lack of reasonable care...;
- 323.130 A violation which occurs through a greater degree of fault, meaning reckless, knowing or intentional conduct will be assigned 16 to 30 points, depending on the degree of fault.

Utah Admin R. 645-401-323.100-130.

"reckless, knowing or intentional," the assessment officer must assign a minimum of 16 points, up to a maximum 30 points, depending on the degree of fault. Utah Admin. R. 645-401-323.130.

Appeal of Penalty Assessment.

If the operator wishes to contest the penalty assessment, it has two avenues of appeal. First, the operator may appeal the penalty assessment informally. Utah Admin R. 645-401-700. An informal appeal is heard by an assessment conference officer appointed by the Board.³ The assessment conference officer must "consider all relevant information" and either settle the issues, or affirm, raise, lower or vacate the penalty. Utah Admin. R. 645-401-723.

To take advantage of the informal appeal option, the operator must request the appeal within 30 days of issuance of the proposed assessment. Utah Admin. R. 645-401-710. Failure to timely request an informal appeal results in a waiver of the operator's informal appeal rights. As Utah Admin. R. 645-401-710 provides:

The Division will arrange for a conference to review the fact of the violation and/or the proposed assessment or reassessment, upon written request of the permittee, if the request is received within 30 days

³ Utah Admin. R. 645-401-721 provides:

The Board will assign an assessment conference officer to hold assessment conferences. The assessment conference will be held within 60 days from the date of issuance of the proposed assessment or the end of the abatement period, whichever is later.

from the date the proposed assessment or reassessment is received by the violator.

Utah Admin. R. 645-401-710.

In addition to the informal appeal, the operator may also directly appeal the penalty assessment to the Board. Utah Admin. R. 645-401-800.⁴ Unlike an informal hearing, an appeal to the Board is a formal adjudicatory proceeding.

To avail itself of this option, the operator must petition the Board for review within 30 days of the proposed assessment. Utah Admin. R. 645-401-810. If the operator fails to timely request a hearing, the proposed assessment becomes a final order of the Board. As Utah Admin. R. 645-401-910 provides:

If the permittee fails to request a hearing as provided in R645-401-810, the proposed assessment will become a final order of the Board and the penalty assessed will become due and payable upon expiration of the time allowed to request a hearing.

Utah Admin. R. 645-401-910.

⁴ Utah Admin. R. 645-401-810 provides:

A permittee charged with a violation may contest the proposed penalty or the fact of the violation by submitting (a) a petition to the Board and (b) an amount equal to the proposed penalty or, if a conference has been held, the reassessed or affirmed penalty to the Division (to be held in escrow as provided in R645-401-820) within 30 days of the proposed assessment or reassessment, or 15 days from the date of service of the conference officer's action, whichever is later, but in every case, the penalty must be escrowed prior to commencement of the formal hearing.

THE PATTERN OF VIOLATION PROCESS

When an operator has been cited with two or more violations within a twelve-month period, the Division is obligated to review the violations to determine whether a "Pattern of Violation" exists. Utah Admin. R. 645-400-332.300.⁵ To determine whether a Pattern of Violation exists, the Director must make a preliminary determination that (1) two or more violations were issued within a 12-month period; (2) the violations were issued as a result of a state inspection; (3) the violations were of the same or related requirements of the State Program or permit; and (4) that each "violation was caused by the permittee willfully or through unwarranted failure to comply." Utah Admin. R. 645-400-332. If the Director determines that a Pattern exists, the Director must recommend that the Board issue an Order to Show Cause as to why the operators permit should not be suspended or revoked. Utah Admin. R. 645-400-332.200.

To determine whether the violation was caused by the operator's "willful" or "unwarranted" conduct, the Director examines the number of penalty points assigned to each finalized NOV. Although the Utah Coal Statute and Regulations do not

⁵ Utah Admin. R. 645-400-332.300 provides that:

The Director will promptly review the history of any violations of any permittee who has been cited for violations of the same or related requirements of the State Program, or the permit during three or more state inspections of the permit area within a 12-month period.

Utah Admin. R. 645-400-332.300.

specifically define the term "unwarranted," the Federal Regulations define "unwarranted" to mean "the failure of a permittee to prevent the occurrence of any violation of his or her permit or any requirement of the Act due to indifference, lack of diligence, or lack of reasonable care." 30 C.F.R. § 843.5. The federal regulations define "willful" to mean an act or omission committed by a person who intends the result which actually occurs." 30 C.F.R. § 843.5.

FINDINGS OF FACT

1. On February 27, 1992, the Division issued NOV N91-35-1-1 to Co-Op for its construction of a road within the permit area prior to receiving authorization from the Division. Once NOV N91-35-1-1 was issued, the Board's assessment officer reviewed the violation to determine how many penalty points to assess the violation. During his review, the assessment officer examined the conduct that led to the violation and determined that Co-Op had acted recklessly, knowingly, or intentionally. Accordingly, the assessment officer assessed 23 penalty points for Co-Op's conduct.

2. Co-Op did not appeal either formally or informally, the penalty assessment of NOV N91-35-1-1. On June 21, 1991, Co-Op paid the assessed penalty.

3. When Co-Op failed to timely appeal the penalty assessment for NOV N91-35-1-1, the penalty assessment became a final order of the Board.

4. On July 2, 1991, the Division issued NOV N91-26-7-2(#2) to Co-Op for its failure to obtain Division approval before enlarging a shop pad. After the NOV was issued, the Board's assessment officer reviewed the violation to assess penalty points. The assessment officer determined that Co-Op's failure to construct the shop pad without first seeking approval of the Division was reckless, knowing and intentional. Therefore, the assessment officer assigned 25 penalty points for Co-Op's degree of fault for NOV N91-26-7-2(#2).

5. Co-Op did not appeal, either formally or informally, NOV N91-26-7-2(#2). On October 15, 1991, Co-Op paid the assessed penalty.

6. When Co-Op did not timely appeal NOV N91-26-7-2(#2), the penalty assessment became a final order of the Board. Utah Admin. R. 645-401-910.

7. On April 26, 1991, the Division issued NOV N91-20-1-1 to Co-Op for its failure to operate in accordance with the terms of its permit, applicable performance standards and requirements of the State Program, and for failure to submit all maps and information required by a Division Order issued on November 27, 1990. The assessment officer determined that Co-Op's failure to submit the required plans constituted reckless, knowing or intentional conduct and assigned 20 points for fault.

8. Co-Op filed an informal appeal of NOV N91-30-1-1 which was upheld in an informal conference. Co-Op did not appeal the Informal Order to the Board.

9. On May 15, 1992, the Division notified Co-Op that it had determined that a potential Pattern of Violations existed at the Bear Canyon Mine.

10. Co-Op requested an informal hearing and testimony was offered by Co-Op and the Division regarding the violations. The Director determined that NOV's N91-35-1-1 and N91-26-7-2(#2) constituted a Pattern. The Director determined that NOV N91-20-1-1 did not constitute a pattern because it did not arise out of a state inspection and because Co-Op's conduct underlying the NOV was not willful or unwarranted.

11. Based on the Director's determination that NOV's N91-35-1-1 and N91-26-7-2(#2) constituted a Pattern of Violation, the Director recommended that the Board issue an Order to Show Cause. The Director also recommended that Co-Op's mining privileges be suspended for forty-eight hours.

12. Thereafter, the Board issued an Order to Show Cause and set a hearing to determine whether the NOVs constituted a Pattern of Violation pursuant to Utah Code Ann. § 40-10-22(1)(d) and Utah Admin. R. 645-400-331.

13. At the hearing, Co-Op attempted to introduce evidence that its conduct leading to the issuance of the NOVs was not willful or unwarranted. The Division's counsel objected to the introduction of the evidence on the basis that the degree of fault underlying the NOV's had been previously determined by the Board's final penalty assessments in which the Board determined that the conduct underlying the NOV's was reckless, knowing and

intentional. Accordingly, the Division's counsel argued that those findings were res judicata and that any attempt to re-examine the degree of fault underlying the NOVs was barred by the doctrine of collateral estoppel.

CONCLUSIONS OF LAW

The principles of res judicata "apply to enforce repose when an administrative agency has acted in a judicial capacity in an adversary proceeding to resolve a controversy over legal rights and to apply a remedy." Utah Dep't of Administrative Services v. Public Services Commission, 658 P.2d 601, 621 (Utah 1983). See also United States v. Utah Construction and Mining Co., 384 U.S. 394, 422 (1966). ("When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.") See also McCulloch Interstate Gas Corporation v. Federal Power Commission, 536 F.2d 910 (10th Cir. 1976). ("A party may not collaterally attack the validity of a prior agency order in a subsequent proceeding. The principles of collateral estoppel may properly be applied in administrative cases.")⁶

⁶ The doctrine of res judicata is based upon the "premise that the proper administration of justice is best served by limiting parties to one fair trial of an issue or a cause." Mel Trimble Real Estate v. Monte Vista Ranch Inc., 758 P.2d 451, 453 (Utah App. 1988). "[R]es judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." Mel Trimble Real Estate, 758 P.2d 453, citing Allen v. McCurry, 449 U.S. 90

The doctrine of res judicata has two separate but related branches. The first branch, claim preclusion, bars the relitigation by the parties of a claim for relief previously resolved by a judgement on the merits. Mel Trimble Real Estate, 758 P.2d at 453; Penrod v. Nu Creation Creme, Inc., 669 P.2d 873, 875 (Utah 1983). See also Braselton v. Clearfield State Bank, 606 F.2d 285, 287 (10th Cir. 1979). The second branch of res judicata is collateral estoppel, or issue preclusion. Under this doctrine, "the relitigation of factual issues that have once been litigated and decided is precluded even if the claims for relief in the two actions are different. Mel Trimble Real Estate, 758 P.2d at 453, Penrod v. Nu Creation Creme, Inc., 669 P.2d at 875. The Utah Supreme Court has outlined a four-part test to determine whether collateral estoppel applies:

(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question?

(2) Was there a final judgment on the merits?

(3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

(4) Was the issue in the first case competently, fully, and fairly litigated?

Searle Bros. v. Searle, 588 P.2d 689, 691 (Utah 1978). We find that all four elements are met.

We conclude that the Board's determination on the degree of fault underlying the NOV's is identical to the issue now before us. When the Board's assessment officer assigned penalty points

(1980).

to the NOV's, he examined the nature and degree of Co-Op's conduct that led to the issuance of the NOV N91-35-1-1 and NOV N91-26-7-2(#2). The issue presently before the Board is identical, namely, to examine the identical conduct that led to the identical violations. There is simply no element presently before the Board that would not have been examined in the underlying NOV assessment hearings.

We also conclude that there was a final judgment on the merits. When the Board's assessment officer issued the penalty assessments for NOV's N91-35-1-1 and N91-26-7-2(#2), he determined that in both instances Co-Op had acted recklessly, knowingly, and intentionally in failing to seek Division approval prior to its construction activities. Co-Op never appealed either penalty assessment. When Co-Op failed to appeal the proposed penalty assessments, those assessments became final orders of this Board. See Utah Admin. R. 645-401-910 ("If the permittee fails to request a hearing as provided in R645-401-810, the proposed assessment will become a final order of the Board." See also Gem Mining Company, Inc. v. OSM, 584 ALJ 4054 (Nov. 18, 1988); Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299 (March 12, 1990) ("when a party has had an opportunity to obtain review within the Department and no appeal was taken . . . the decision may not be reconsidered in later proceedings except upon a showing of compelling legal or equitable reason, such as violations of basic rights of the parties or the need to prevent an injustice.").

We also find that Co-Op was a party to the underlying NOV hearings and the matter presently before the Board. Finally, we find that the issue of the degree of fault underlying the issuance of the NOV's was fully and fairly litigated in the first forum. Co-Op was served with the proposed penalty assessments by the Board's assessment officer. Those proposed penalty assessments contained the findings that Co-Op acted recklessly, knowingly, and intentionally by failing to seek and obtain the Division's approval before commencing construction activities at the Bear Canyon Mine. Co-Op had thirty days to appeal those findings either formally or informally. When Co-Op failed to appeal the assessment officer's findings, those findings became final orders of the Board and Co-Op waived its right to later contest those orders. See Utah Admin. R. 645-401-910. Co-Op's failure to exercise its appeal rights, cannot now prevent the preclusive effect of the Board's final order.

Accordingly, we conclude as a matter of law that the doctrine of collateral estoppel prevents Co-Op from re-litigating the issue of fault underlying the NOV's because that issue was resolved on the merits when Co-Op failed to appeal the Board's findings that Co-Op's conduct was reckless, knowing and intentional.

Finally, we conclude that the Board's previous determination that Co-Op acted recklessly, knowingly, and intentionally constitutes a finding that Co-Op acted "willfully" or "without warrant." Although the Utah Coal Statute and Regulations do not

specifically define "unwarranted" or "willful", the Federal Regulations make it clear that the assessment of 16 or more penalty points for fault constitutes a finding that the operator acted willfully or without warrant. The federal regulations define "unwarranted" to mean the failure of a permittee to prevent the occurrence of any violation of its permit due to indifference, lack of diligence, or lack of reasonable care." 30 C.F.R. § 843.5.⁷ Since the assessment of 16 or more penalty points requires a Board finding of the existence of a greater degree of fault than lack of diligence or lack of reasonable care, the assessment of 16 or more penalty points by definition means that the operator's conduct was, at the very least, unwarranted.

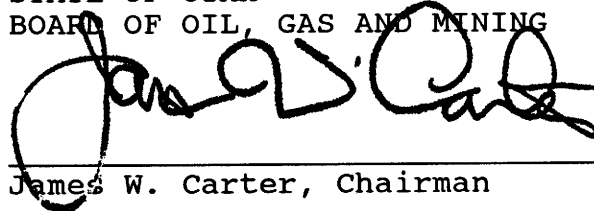
ORDER

THEREFORE, the Board Orders as follows:

1. Co-Op is collaterally estopped from introducing evidence as to the degree of fault giving rise to NOV N91-35-1-1 and NOV N91-26-7-2(#2) in the Pattern of Violation hearing presently before the Board.

DATED this 14th day of February, 1993.

STATE OF UTAH
BOARD OF OIL, GAS AND MINING



James W. Carter, Chairman

⁷ The federal regulations define "willful" to mean an act or omission committed by a persons who intends the result which actually occurs." 30 C.F.R. § 843.5.

CERTIFICATE OF MAILING

I hereby certify that I caused a true and the foregoing NOTICE OF HEARING and ORDER for Cause No. ACT/015/025 to be mailed by certifie prepaid, the 8th day of February 1993, to the

✓ Carl Kingston, Esq.
Attorney for Co-Op
53 West Angelo Avenue
P.O. Box 15809
Salt Lake City, Utah 84115

✓ Jeffrey W. Appel, Esq.
Michele Mattsson, Esq.
Appel & Mattsson
175 South Main Street, Suite 1110
Salt Lake City, Utah 84111

✓ Wendell Owen
Co-Op Mining Company
P.O. Box 1245
Huntington, Utah 84528

✓ Eldon Kingston
Co-Op Mining Company
P.O. Box 1245
Huntington, Utah 84528

P 074 975 106

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1. <input checked="" type="checkbox"/> Sender's Complete Items 3 and 4. Put your address in the "RETURN TO" space on the reverse side. Failure to do this will prevent the mail from being returned to you. For additional services are desired, and complete items 1 and 2 and the date of delivery. For additional services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.	2. <input type="checkbox"/> Show to whom delivered, date, and address (if requested).	3. Article Addressed to: Kimly Mangum Mangum Engin 388 E Boynton Kaysville UT	4. Article Number P 074 975 106
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5. Signature - Address <input checked="" type="checkbox"/>	6. Signature - Agent <input checked="" type="checkbox"/>	7. Date of Delivery FEB 10 1993	8. Addressee's Address (ONLY if requested and fee paid) Always obtain signature of addressee or agent and DATE DELIVERED.

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5. Signature - Address <input checked="" type="checkbox"/>	6. Signature - Agent <input checked="" type="checkbox"/>	7. Date of Delivery 2-9-	8. Addressee's Address (ONLY if requested and fee paid) Always obtain signature of addressee or agent and DATE DELIVERED.

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Sent to Carl Kir

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5. Signature - Address <input checked="" type="checkbox"/>	6. Signature - Agent <input checked="" type="checkbox"/>	7. Date of Delivery 2-10-93	8. Addressee's Address (ONLY if requested and fee paid) Always obtain signature of addressee or agent and DATE DELIVERED.

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Sent to Wendell Owen

1. <input checked="" type="checkbox"/> Sender's Complete Items 3 and 4. Put your address in the "RETURN TO" space on the reverse side. Failure to do this will prevent the mail from being returned to you. For additional services are desired, and complete items 1 and 2 and the date of delivery. For additional services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.	2. <input type="checkbox"/> Show to whom delivered, date, and address (if requested).	3. Article Addressed to: Wendell Owen Co-Op Mining Co PO Box 1245 Huntington UT 84528	4. Article Number P 074 975 105
5. Signature - Address <input checked="" type="checkbox"/>	6. Signature - Agent <input checked="" type="checkbox"/>	7. Date of Delivery FEB 10 1993	8. Addressee's Address (ONLY if requested and fee paid) Always obtain signature of addressee or agent and DATE DELIVERED.

PS Form 3811, Mar. 1988 * U.S.G.P.O. 1988-212-865 DOMESTIC RETURN RECEIPT